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Immigrant Selection and the Canadian Human Rights Act

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IMMIGRANT SELECTION AND THE CANADIAN HUMAN RIGHTS ACT

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RÉSUMÉ

L'auteure étudie la difficulté de contester une demande de droit d'établissement en vertu de la *Loi sur l'immigration* devant la Commission canadienne des droits de la personne qui détermine si le demandeur a fait l'objet de discrimination en vertu de la *Loi canadienne sur les droits de la personne.*

> "The *Immigration Act* is replete with provisions which not only permit but require that adverse differentiation be made in relation to individuals on grounds of national origin; its provisions also require adverse differentiation on grounds of age, marital and family status as well as disability. What saves the Commission the necessity of constantly supervising the Act's administration is the limitation of *CHRA* s.40(5) [*Canadian Human Rights Act*] on its authority to deal with complaints of occurrences outside Canada by persons not entitled to enter Canada. The [Immigration] Act is about little else than discriminatory practices and, accepting that the *quasi* constitutional *CHRA* is paramount, in circumstances where the Commission has jurisdiction to investigate, those discriminatory practices have to be justified as provided in paragraph 15(g)."[1]

I. INTRODUCTION

When the legislation creating the Canadian Human Rights Commission was introduced into Parliament in 1977, Minister of Justice, Ron Basford stated that:

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1. *Anvari v. Canada (Employment and Immigration Commission*, [1993] 19 IMM. L.R. (2d) 192 at 196.

> these prohibitions against discriminatory conduct will apply to all federal departments and agencies and any business or industry under federal jurisdiction.[2]

This principle is specifically set out in the *Canadian Human Rights Act* as passed in section 2, which states that the purpose of the *Act* is to give effect to the principle

> that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex ... [3]

Both the stated intention of the legislation and the purpose set out in the preamble appear at first blush to make the Commission ideally situated to review the Department of Immigration for discriminatory practices. Indeed, one could hardly envisage a more compelling denial of opportunity than that of the immigrant denied entry to Canada on the basis of race, national or ethnic origin, colour, religion, age, sex or disability. Further, the *Immigration Act* itself now contains non-discrimination provisions in section 3(f) which states that an immigration objective is

> (f) to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate in a manner inconsistent with the *Canadian Charter of Rights and Freedoms*;[4]

The *Charter* guarantees rights of equality, specifically prohibiting discrimination on the basis of race, ethnic or national origin, colour, religion etc. Any infringement of these guarantees will be rendered unlawful unless the Canadian Government can justify it under section 1.[5] The inclusion of these rights illustrates, at least officially, a Government commitment for the Immigration Department, to the same non-discrimination principles underlying the *Canadian Human Rights Act.*

Canadian immigration policies were, from the turn of the century until the mid 1960's, based on an overt preference for northern European immigrants. This

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2. *House of Commons Debates* (11 February 1977) at 2976.

3. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s.2. [hereinafter *CHRA*]

4. *Immigration Act*, R.S.C. 1985, c. I-2.

5. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

preference was reflected in both the policies and the delivery system which evolved to actively recruit immigrants from northern Europe, and to control immigration from other parts of the world. Given this recent history, it is essential to have at hand the tools to assess the Department for discriminatory practices. This is particularly so, in light of the degree of discretion which is still vested in the Minister and the Department, and the potential for the abuse of that discretion in a discriminatory manner.

The very process of immigration involves the selection of one immigrant over another, all from a pool of ethnically, culturally and religiously diverse peoples. The pool of candidates has members of the historically dominant cultural groups in Canada, namely the British and the French, with whom the Department's employees would naturally identify and sympathize.[6] Indeed, it would be naive to assume that some favouritism would not be present.

Notwithstanding the Department's commitment to principles of non-discrimination enunciated in section 2 of the *Immigration Act*, it is clearly essential to the process that the task of ensuring that those principles are respected be vested with some outside agency, such as the Commission. Despite its long delays, one would expect the Human Rights Commission to be ideally suited for the job. It is independent, accessible, inexpensive to the complainant and has the power to conduct comprehensive self-initiated reviews with a view to remedying problems of systemic discrimination.

II. PROHIBITED ACTIVITIES UNDER THE *CHRA*

The Canadian Human Rights Act seeks to ensure that individuals have access to equal opportunities in Canadian society, without regard to race, national or ethnic origin, colour, religion and disability.[7] Equality of opportunity is ensured by prohibiting discrimination in the provision of goods, services, accommodation and facilities that are within federal jurisdiction.

Section 5 of the *CHRA* provides that:

> It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public,

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6. The Canadian Ethnocultural Council analyzed visible minority representation in the management of the Department of Employment & Immigration for the years 1990 and 1991 and determined that the number of management persons who were visible minorities was so small that they had to be suppressed to maintain the confidentiality of the individuals. Overall, in management and non-management positions visible minorities represented only 2.4% of the employees. Canadian Ethnocultural Council, *Employment Inequity*, (Ottawa:Canadian Ethnocultural Council, (1992)) at Table 3-1 and Table 2-3.

7. *Supra* note 3, s.2.

> (a) to deny, or to deny access to, any such goods, service, facility or accommodation to any individual, or,
> (b) to differentiate adversely in relation to any individual, on a prohibitive ground of discrimination.

The prohibited grounds of discrimination are enumerated in section 3 (1) of the *CHRA*:

> For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

Immigration clearly comes under the federal parliamentary jurisdiction. Section 95 of the *British North American Act*[8] grants concurrent federal and provincial jurisdiction over immigration, so that the activities of the Department should be subject to review under the *Canadian Human Rights Act.*

Section 40(5)(a–c) of the *CHRA*, however, imposes important restrictions on the Commission's jurisdiction; restrictions which relate to the character of the complainant and the locus of the discriminatory practice. These restrictions operate to severely limit jurisdiction in many immigration cases.

> (5) No complaint in relation to a discriminatory practice may be dealt with by the Commission under this Part unless the act or omission that constitutes the practice
>
> (a) occurred in Canada and the victim of the practice was at the time of the act or omission either lawfully present in Canada or, if temporarily absent from Canada, entitled to return to Canada;
> (b) occurred in Canada and was a discriminatory practice within the meaning of section 8, 10, 12 or 13 in respect of which no particular individual is identifiable as the victim; or
> (c) occurred outside Canada and the victim of the practice was at the time of the act or omission a Canadian citizen or an individual lawfully admitted to Canada for permanent residence.

By their very nature, the bulk of immigration services are services delivered outside Canada, to people who are not citizens, and who may have no connection to Canada other than their application for admission. Indeed, it would appear that by section 40(5), the government may have insulated from review by the Commission the Department's main activity of immigrant selection. Indeed, this is the position that the Department itself has systematically adopted, casting the section 40 exclusions in the widest possible terms.

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8. *Constitution Act*, 1867 (U.K.), 30 & 31 Vict.

III. General Scheme of the *CHRA*

The *CHRA* provides that any individual or group of individuals may file a complaint with the Commission if they have reasonable grounds for believing that a person is engaging in a discriminatory practice.[9] The Commission also has the jurisdiction to investigate on its own initiative if they have reasonable grounds to believe that discrimination is being practised.[10]

Once a complaint has been lodged, the Commission has the power to appoint an "investigator" who has powers of search and seizure under section 43. If the investigator's report indicates that the complaint is founded, and no grounds for dismissal exist pursuant to section 41(c–e), the Commission refers the case for the appointment of a Human Rights Tribunal which will enquire into the complaint.[11] The process therefore involves a two-step process; complaint, investigation and assessment and; secondly, the possibility of a tribunal hearing itself.

IV. Jurisdiction to Investigate

From the onset, the Department of Immigration has taken the position that in addition to the exclusionary provisions of section 40(5)(a–c), the Commission's jurisdiction was further limited by the wording of section 5 of the *CHRA*. The Department argued that it was not engaged in the **"provision of ... services ... customarily available to the general public"** within the meaning of section 5.

In 1977, a group of Jamaican domestic workers initiated a series of complaints alleging that they were being discriminated against because of their race. They alleged that black women had been singled out for deportation because they had failed to disclose the existence of dependent children when they applied for entry. Part of their evidence included internal departmental memoranda which purportedly illustrated the discrimination. The complainants brought an application for an injunction in the Trial Division of the Federal Court, in an attempt to restrain the Minister of Immigration from executing deportation orders against them, until the Human Rights complaints had been dealt with. The application was dismissed, and on appeal to the Court of Appeal, Mr. Justice Le Dain, speaking for the Court, said

> Having concluded for these reasons that an injunction will not lie for a purpose such as that invoked in the present case, I do not find it necessary to express an opinion as to whether the application of the inquiry and deportation provisions

9. *Supra* note 3, s.40(1).

10. *Ibid.* at s.40(3).

11. *Ibid.* at s.44(1)(a).

> of the Immigration Act is a service customarily available to the general public within the meaning of section 5 of the Canadian Human Rights Act. The question as to the extent, if any, to which the administration and application of federal statutes, whether regulatory in purpose or not, fall under the Canadian Human Rights Act is, of course, a serious one. There may be important distinctions to be drawn between different aspects of the public service, based on the facts established in each case. It is preferable, I think, that these questions should be determined in the first instance by the Commission, as section 33 would appear to intend, before a court is called upon to pronounce upon them.[12]

Despite these obiter comments on Commission jurisdiction by Mr. Justice Le Dain, the failure to grant the injunction left the Department free to deport the applicants and none of the Human Rights applications proceeded.[13]

Lodge clearly did not resolve the jurisdictional dilemma, but the statement by the Court that some services could conceivably be subject to review, while others might not be, resulted in further ambiguity about the Commission's powers over immigration. However, despite what appeared to be a clear directive from the Court as to who determines jurisdiction in the first instance, the Department took the position that the Commission did not have the power to embark on even the investigative stage of the process, let alone to proceed to determine its own jurisdiction.

In the ensuing ten years, the Department prevented the Commission from investigating immigration complaints by refusing to cooperate. By 1988, there were ten outstanding complaints concerning immigration practices, brought by five different complainants. The Department had stymied all investigations and all ten cases were referred to the Federal Court (Trial Division) by way of a reference, *Re Singh*, in an attempt to settle the question of the Commission's jurisdiction over the initial investigative stage of immigration complaints.[14]

In *Re Singh* the Department continued to argue the section 40(1) exclusions of the *CHRA*, and that section 5 limited the scope of the Commission's jurisdiction. Further, they argued that the Commission was not competent to determine its own jurisdiction because the complaints were clearly outside the Commission's jurisdiction, barring the Commission from embarking on even preliminary investigations of complaints.

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12. *Lodge v. Minister of Employment and Immigration*, [1979] 1 F.C. 775 at 785 [hereinafter *Lodge*].

13. Information obtained from discussions with the Canadian Human Rights Commission.

14. *Re Singh*, [1989] F.C.J. No. 414 (Q.L.).

In all ten of the cases the complainants were either Canadian citizens or permanent residents of Canada. The harm alleged was the failure to grant visitors' visas to close family relatives and alleged discrimination on prohibited grounds resulting from the refusal by the Department to permit sponsorship for an immigrant visa to close relatives as "members of the family class".[15]

In determining the questions in *Re Singh*,[16] the Court found as a preliminary matter that the Commission clearly had the jurisdiction to enquire into the limits of its own jurisdiction.

> An examination of the Canadian Human Rights Act makes it clear that the Commission is a body whose jurisdiction to enquire includes the jurisdiction to enquire into the limits of its own jurisdiction. The initial jurisdiction of the Commission is triggered by the filing of a complaint; once that happens, the Commission is required by the mandatory words of section 33 to deal with it ("the Commission shall deal"). The question of jurisdiction is specifically dealt with in subparagraph 33(b)(ii), in a manner that makes evident Parliament's intent that the Commission itself should in the first instance decide if a matter is within its jurisdiction.

Having established this preliminary point, the Court went on to phrase the question of the reference very simply as,

> whether the complaints cannot possibly relate to discriminatory practices in the provision of services customarily available to the general public and whether the complainants could not possibly be described as victims of the alleged discriminatory practices.

The Federal Court considered the broad scope and intent of the *CHRA* to determine how liberally it should be interpreted. After reviewing section 2 of the *Act* which sets out its purpose, the Court found that it is

> cast in wide terms and that both its subject and its stated purpose suggest that it is not to be interpreted narrowly or restrictively[17]

Having established the broad terms of reference, the Court proceeded to deal with the two arguments raised by Immigration to determine if the facts could conceivably lead to a finding of discrimination. The first threshold issue was that immigration services, those concerned with the granting of landed immigrant and visitor's visas could not be **"services ... customarily available to the general public"**. In deciding this question, the Court stated

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15. *Immigration Act, supra* note 4, s.2(1).

16. *Supra* note 14.

17. *Canada (A.G.) v. Cummings*, [1980] 2 F.C. 122 at 131.

> that, by definition, services rendered by public servants at public expense are services to the public and therefore fall within the ambit of Section 5.[18]

While Mr. Justice Hugessen made it clear that he was not making a final determination on the question of services rendered in Canada and abroad by Immigration, it is clear that he was not convinced that such services were not **"services customarily available to the general public"**

The second argument was that the complainants, who were all Canadian citizens or permanent residents, were not the "true victims" of the alleged discriminatory practice. The "true victims" were those who had applied for visas and been refused, and all of these people were excluded by section 32(5)(b) [now section 40(5)(c)] of the *CHRA* because the refusal occurred outside Canada and they were neither Canadian citizens nor people who had been lawfully admitted to Canada for permanent residence.

In rejecting this argument, the Court found that there could conceivably be several "victims" of a discriminatory practice, even extending to those who are unintended victims. Relying heavily on the stated objectives of the *Immigration Act*, including the reunification of families, and the facilitation of the entry of visitors,[19] the Court found that the Canadian family members, denied the company of their relatives as either visitors or landed immigrants, could have standing as "victims", and could therefore initiate complaints. The Court in *Re Singh* did not make any specific findings of fact in the ten cases on reference but only stated that there could conceivably be discrimination, the determination being left to the Commission after a full review of the facts.

Having cleared the preliminary hurdle of the Commission's jurisdiction to investigate, the Court opened the door to the determination of substantive immigration issues by the Commission twelve years after its formation. With the referral by the Commission of a number of cases to the Human Rights Tribunal following *Re Singh*, the important issues in immigration complaints are now emerging. Unfortunately, the question of the jurisdiction of the Commission continues to pose the single most important obstacle to a comprehensive and effective anti-discrimination review.

A. Service "Customarily Available to the General Public"

> The interpretation of offered to the public' ... should be as follows: any service offered by a government is a service offered to the public. This interpretation

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18. *Re Singh, supra* note 14, at 23.

19. *Supra* note 4, s.3(3).

> furthers the policy of the Code of eliminating discrimination, for all government services would be covered. It is also consonant with the overall expansive scope of the Code ... A government by its nature has only public relationships with persons ... [20]

In 1984 Mehran Anvari filed a complaint alleging discrimination on the basis of physical disability in his application for "landing" under the IRAN programme. The Immigration Department took the position that the IRAN programme was a special, one-time policy created by Order-in-Council for the purpose of landing Iranians who had established themselves in Canada. As such, they argued that it was an "individualistic" service, and not a service "customarily available to the public". The Department argued that because only Iranians, a specific and special group, were eligible to apply under the IRAN program, the service was not one which was available to members of the general public.

This narrow interpretation of "public" was a position which received some currency during the late 1980's, and its application to deny jurisdiction to the Commission was not limited to the area of Immigration law.[21]

At first instance, the Human Rights Tribunal found that:

> The Immigration Act, an Act of the Parliament of Canada, has general scope to provide a service to the public; under this Act and its Regulations, the officials involved in the processing of individuals towards "landed immigrant" status carry out an official duty as agents of the Crown. Thus, each official is providing a service to the public.[22]

On review at the Human Rights Review Tribunal this interpretation was upheld,

> The present Tribunal is of the opinion that the Canada Employment and Immigration Commission derives its authority from an Act passed by the Parliament of Canada. The Scope of this Act is general and whenever the Government of Canada applies an Act of general scope, it is providing a service to the public. The Canada Employment and Immigration Commission was carrying out its official duty as an agent of the Crown and thus was providing a service to the public.[23]

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20. D. Greschner, "Why Chambers is Wrong: A Purposive Interpretation of 'Offered to the Public'" (1986) Sask. L. Rev. 161

21. See *Saskatchewan Human Rights Commission and Chambers v. Gov't of Sask., Department of Social Services* (15 July, 1987), Saskatoon 1573 (Sask. Q.B.) and Greschner, *ibid.*

22. *Anvari v. Canada (Employment and Immigration Commission)*, [1988], T.D. 18/88 (C.H.R.C). 13; 10 C.H.R.R. D/5816, at 5822.

23. *Anvari v. Canada (Employment and Immigration Commission)*, [1991] C.H.R.D. No. 2; 14 C.H.R.R. D/292 at 296.

This very broad interpretation of "public", which appears to encompass almost any public activity was affirmed by the Federal Court in *Rosin* in 1991.

> In order for a service or facility to be publicly available, it is not required that all the members of the public have access to it. It is enough for a segment of the public to be able to avail themselves of the service or facility. Requiring that certain qualifications or conditions be met does not rob an activity of its public character. The cases have shown that "public" means "that which is not private", leaving outside the scope of the legislation very few activities indeed.[24]

The narrow quantitative approach to "public" was finally laid to rest by the Supreme Court in 1993 when Mr. Justice Lamer, speaking for the Court, held that:

> It appears to me that attention in prior cases to the quantitative characteristics of the group to whom the service or facility is available does not focus adequately on other relevant factors. If the focus is purely quantitative, it is indeed hard to see how anything less than all citizens can be said to be the "public" of a given municipality, province or country.[25]

> Every service has its own public and once that "public" has been defined through the use of eligibility criteria the Act prohibits discrimination within that public.[26]

1. Can "Public" Extend to People Outside Canada?

The activities involved in providing immigrant and visitor visas are, for the most part, activities which are conducted outside Canada at overseas visa offices, and the recipients of the services are exclusively people who have no independant right to enter Canada. In *Naqvi*[27] an argument was made by the Department that, in order not to give extraterritorial application to the *Canadian Human Rights Act*, "the public" in section 5 of the *Act*, must be limited to the Canadian "public" only. Such an interpretation would have excluded from review all of the activities of visa officers overseas. In adopting a broad, objectively based interpretation of the *Act*, the Tribunal in *Naqvi* did not specifically deal with the "extraterritorial" argument, but found that:

> Foreign service officers posted in other countries are representatives of Canada. There is no reason why the principles of the CHRA should not apply to their activities.[28]

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24. *Canada (A.G.) v. Rosin*, [1991] F.C. 391 at 398.

25. *University of British Columbia v. Berg*, [1993] 2. S.C.R. 353. (QL) at 57.

26. Ibid. at 59.

27. *Naqvi v. Canada (Employment and Immigration Commission)*, [1993] C.H.R.D. No.2 (QL) at 83. [hereinafter *Naqvi*] (Judicial Review Application to Federal Court commenced but not yet determined).

28. *Ibid.* at 67.

It is not clear why the "extraterritorial" argument was rejected, but the issue does raise some important questions that should have been addressed, if for no other reason than to discredit them once and for all.

In *Naqvi* the Department argued that the territorial principle of International law assumes that statutes have no extraterritorial application.[29] Support for the extraterritorial principle is set out in *The People v. Tyler*:

> ... It is well settled, as a general principle, that the laws of no nation can have extraterritorial force—that criminal laws especially cannot operate beyond the territorial limits of the government by which they are enacted. [30]

The flaws in the analogy are obvious, and perhaps for that reason did not merit more than a passing reference in the decision. The *Canadian Human Rights Act* is remedial, not punitive legislation, whose object is the elimination of discrimination within the legislative authority of the Federal parliament.[31] The investigation of human rights complaints involves an examination of the policies and practices of the Canadian Immigration Department, and their employees. Any remedial action ordered would be against the Canadian government or its agents, not against the non-national complainants. Nobody argues that Canadian visa officers operating abroad are operating without jurisdiction because of extraterritorial considerations when applying Canadian Immigration Laws. Why then, should extraterritorial considerations arise when we seek to review their decisions under human rights legislation?

If we make an analogy with the Criminal law, the "accused" would be the Federal Department, and the "victims" would be the non-national complainants. Principles of territorial jurisdiction in international law hold that states can exercise jurisdiction if either the crime is committed or the criminal is resident within the national territory.[32] A strong argument can be made that the "crime" of discrimination under the Canadian Human Rights Act is one which is committed by the Canadian government which is, by definition, resident within Canada.

Further, given the remedial, not punitive purposes of the legislation, there are no public policy reasons preventing the application of the *Canadian Human Rights Act* in situations that involve non-nationals residing outside Canada. The only conceivable results of any Commission inquiry would be to either preserve the status quo for the complainants, or to place them in a better position. As the

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29. *Ibid.* at 66.

30. (1857), 7 Mich. 160 at 220.

31. Supra note 3, s.2.

32. R. v. Godfrey, [1923] 1 K.B. 24.

objects of scrutiny are exclusively Canadian government practices, policies and personnel, and any remedial orders are made exclusively against them, it is hard to imagine that any foreign state could object to jurisdiction as an infringement of **their** territorial sovereignty.

Further, in areas of law related to immigration, there are examples of the extraterritorial application of statutes. In the *Criminal Code*,[33] Canada has taken jurisdiction over offenses of passport forgery and uttering committed outside Canada. Proceedings can be commenced in any territory within Canada, even when the offender is outside Canada, and the offence was committed outside Canada. The *Immigration Act*[34] gives Canada the power to turn away vessels transporting illegal immigrants, when they are in the internal waters of Canada, the territorial seas, or twelve miles beyond the outer limit of the territorial waters. Similarly, we have the power under the *Citizenship Act* to prosecute offenses which are committed outside Canada, once the offender is within Canada, if the act or omission would have been an offence had it actually been committed here.[35]

B. Who can be a Complainant

In *Menghani*,[36] one of the cases involved in *Re Singh*, the complainant had completed a job offer for his brother, who was seeking admission under the "Family Business-Job Offer to Relatives" category. This class, unlike family class applications, does not require a formal sponsorship. The requirements of the category, however, were such that the relative had to be destined to work in the family business in a position of trust for which he or she was qualified.

When *Menghani* reached the Tribunal level in 1991, the Department again argued that the complainant was not a victim, despite the strong wording in *Re Singh*. Because the reasoning in *Re Singh* was based on an analysis of the interests and obligations of sponsors, the Department sought to distinguish *Menghani* by arguing that the complainant was not a true "sponsor" under the *Immigration Act*.[37]

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33. *Criminal Code*, R.S.C. 1985, c. C-46, s.57(6).

34. *Supra*, note 4, s. 90. 1(1).

35. *Citizenship Act*, R.S.C. 1985, c. C-29, s.30(1).

36. *Infra* note 38.

37. During the hearing in *Re Singh, Menghani* had been classified as a sponsorship case based on allegations contained in the original complaint form, despite the fact that no actual sponsorship under Section 79 of the *Immigration Act* had been required.

The Department took the position that the complainant must be a "direct" victim of discrimination, and that the only direct victim in the case was the visa applicant himself, who was obviously not a Canadian citizen or Permanent Resident, and therefore excluded from making a complaint under section 40 of the *CHRA*. In rejecting this argument, the Tribunal cast the test in broader terms:

> It would include anyone in Canada who suffers consequences which are sufficiently direct and immediate.

The Tribunal then set out guidelines for determining whether consequences are sufficiently direct and immediate to warrant inclusion as follows:

1. Degree of consanguinity of the Canadian relative to the prospective immigrant.
2. The dependency (financial, emotional) of the Canadian relative on the prospective immigrant;
3. Deprivation of significant commercial or cultural opportunities to the Canadian relative by the absence of the prospective immigrant;
4. The historical closeness of the relationship between the two persons;
5. The degree of involvement of the Canadian relative in supporting the application for immigration under the Immigration Act and Regulations.[38]

Using the test set out, the Tribunal found on the facts that there was a long standing and close financial and economic relationship between the brothers sufficient to qualify the complainant as a victim.

What is interesting about the guidelines is that, despite the broad wording of the preliminary statement, they appear to assume that only relatives can qualify as victims. It remains to be seen if the list will be invoked only in cases where the relatives are victims, or as a rationale for excluding other categories of victims, such as potential employers who have made job offers to prospective independant immigrants.

The Federal Court, on a judicial review of the Review Tribunal decision in *Menghani,* approved the Review Tribunal decision, and found that third parties can be injured parties and therefore "victims" with standing to bring complaints. The Court appears to adopt the list developed by the Tribunal, going as far as to state that on the facts of *Menghani* the status of "victim" was established.[39]

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38. *Menghani v. Canada (Employment and Immigration Commission),* [1992] C.H.R.D No.4 (QL) at 42.

39. *Canada (Secretary of State for External Affairs) v. Menghani,* [1993] F.C.J. No. 1287 (QL) at 41 [hereinafter *Menghani*].

The reasoning in *Menghani* was adopted by the Tribunal in *Naqvi*, with the added observation that when assessing direct and immediate injury, one can take into account characteristics of the complainant which would lead him or her to identify with the other victim.

> The affront to the dignity of the Complainants must be regarded as more severe where many of the personal characteristics which comprise the grounds of the discriminatory practice are shared by the Complainants- i.e. race, national and ethnic origin and gender (Mrs. Naqvi).[40]

Since the decisions in *Naqvi* and *Menghani*, this broad definition of "Complainant" appears to have been generally accepted by the Courts. In one of the several cases involving allegations of anti-semitic behaviour against New Brunswick school teacher Malcom Ross, Mr. Justice Stratton, of the New Brunswick Court of Appeal found that the parent of a Jewish child in the same school district, who had had no direct contact with Malcom Ross, had the status of complainant under the *New Brunswick Human Rights Act*. Mr. Justice Stratton quoted with approval from *Re Singh*:

> The question as to who is the 'victim' of an alleged discriminatory practice is almost wholly one of fact. Human rights legislation does not look so much to the intent of discriminatory practices as to their effect ... That effect is by no means limited to the alleged 'target' of the discrimination and it is entirely conceivable that a discriminatory practice may have consequences which are sufficiently direct and immediate to justify qualifying as a 'victim' thereof persons who were never within the contemplation or intent of its author.[41]

C. Sections 40(5)(a–c) and the Charter

Sections 40(5)(a–c) of the *Canadian Human Rights Act* serve to limit the jurisdiction of the Commission directly, by denying jurisdiction in cases where the discrimination occurred in Canada, but the person was not lawfully present here, or where the events occurred outside Canada and the victim was not either a Canadian citizen or a permanent resident.[42] While the Commission, Tribunals and Courts have skirted around the issue of jurisdiction, none has grappled with a direct challenge to the constitutionality of the provision itself under the *Charter*. In respect of matters other than immigration, courts have accepted that human rights legislation must itself conform to section 15 of the *Charter*, and have struck down provisions that offended section 15.[43]

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40. *Supra* note 27 at 83.

41. *Board of Education of District No. 15 v. Human Rights Board of Inquiry (N.B.)*, [1989] N.B.J. No. 844 p.33.

42. *Supra* note 3.

43. See for example *Blainey v. Ontario Hockey Association*, 54 O.R.(2d) 513 (C.A.), leave

Clearly, the *CHRA* makes a distinction between those lawfully present in Canada and those who are not, and limits jurisdiction abroad to complainants who are Canadians and Permanent Residents. Madame Justice Wilson, speaking for the Supreme Court, has held that the *Charter* applies to "every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law".[44] Therefore by extension a good argument could and should be made that the equality guarantees under section 15 should apply to prohibit the discrimination inherent in section 40(5)(a) of the *CHRA*. All persons physically present in Canada have a right to equal treatment and benefit of the law under the *Charter*. Denying human rights legislation protection to those who are not lawfully present here would constitute unequal treatment.

The *Charter* is also supposed to apply to all activities of the Canadian government, which arguably should include visa officer decisions. The failure to provide human rights protection to those who are neither Canadians nor permanent residents, but who are nonetheless discriminated against by Canadian visa officers abroad should be open to *Charter* challenge. The Federal Court of Appeal in *Ruparel* [45]has found that the *Charter* does not apply to visa officer decisions, however a strong case has been made that *Ruparel* was wrongly decided.[46]

V. DIRECT AND ADVERSE EFFECT DISCRIMINATION IN IMMIGRATION

A. Direct Discrimination on the Basis of Ethnic Origin and Marital Status.

Where visas are denied based on assumptions made about characteristics or tendencies of people on any of the prohibited grounds, such as "single women of Pakistani origin" this has been held to constitute *prima facie* evidence of discrimination.

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to appeal to S.C.C. refused (1986), 58 O.R. (2d) 274 (S.C.C.).

44. *Singh v. Minister of Employment and Immigraton*, [1985] 1 S.C.R. 177 at 202 [hereinafter *Singh*].

45. *Ruparel v. Canada (Minister of Employment and Immigration)*,[1990] F.C.J. No. 701 (QL) [hereinafter *Ruparel*].

46. For a comprehensive argument as to why this decision is wrong, see D. Galloway, "The Extraterritorial Application of the Charter of Rights to Visa Applicants" (1991) 23 Ottawa L.Rev.335 [1991] I.T.T.L. (QL) 16.

Ms Naqvi applied for a visitor's visa in order to visit her sister in Canada. She was refused because she had not applied in her home country and the visa officer found that she "would stay illegally in the country and get married there".[47] This latter justification for the visa refusal could only have been based on generalizations made by the visa officer concerning Ms Naqvi's race, sex and national origin, because Ms Naqvi herself was never interviewed. The Tribunal found that in order to justify the discrimination the following factors had to be considered:

> A bona fide justification requires consideration of both subjective and objective factors. We have no doubt that at least some immigration authorities hold an honest and sincere belief that the marital status of young persons, particularly women from Pakistan, are relevant factors in determining the bona fides of intention to be a visitor. However, this must be true from an objective standpoint as well in order to justify refusal of a visa. It is the finding of this Tribunal that there has been no objective evidence of bona fide justification.[48]

Clearly, without an interview, the visa officer could not have assessed what Ms Naqvi's true intentions were in coming to Canada, and the Tribunal found that the subjective belief of the visa officer, concerning her intentions, was unsupported by the required objective evidence.

B. Direct Discrimination on the basis of disability

Until recent amendments are proclaimed, the *Immigration Act* discriminates directly against applicants for admission on the basis of disability in section 19(1)(a)(ii).[49] Applicants "suffering from any disease, disorder, disability or other health impairment" are treated differently from and more harshly than other applicants. People who fall into these categories are required to satisfy Immigration that "their admission would not cause or might reasonably be expected to cause excessive demands on health or social services;"[50]

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47. *Naqvi, supra* note 27 at 38.

48. *Ibid.* at 78.

49. Recent amendments removed the direct reference to persons suffering from disease, disorder, disability or other health impairment. The new section, which is not in force at date of publication reads:
(a) persons who in the opinion of a medical officer concurred in by at least one other medical officer, are persons
(i) who, for medical reasons, are or are likely to be a danger to public health or to public safety, or
(ii) whose admission would cause or might reasonably be expected to cause excessive demands, within the meaning assigned to that expression by the regulations, on health or prescribed social services; [1992], c.49, s.10.

50. ARCH (Advocacy Resource Centre for the Handicapped) has commenced a *Charter* challenge to sections 19(1)(a) and (c) by way of Statement of Claim for damages in

In 1983, Mehran Anvari was refused landing in Canada pursuant to this section on the basis of his physical disability. Anvari was born in Iran, where he contracted poliomyelitis as a young child. His disability was later compounded by scoliosis, which together left him with only one partially functional leg, and curvature of the spine. In 1983 a special program was announced in the wake of the Iranian revolution which permitted Iranians to apply for landing from within Canada. Anvari was employed full time and was self-supporting when he applied under the program. Despite this, he was refused admission by reason of 19(1)(a)(ii) of the*Immigration Act* which reads as follows:

> 19.(1) No person shall be granted admission if he is a member of any of the following classes;
> (a) persons who are suffering from any disease, disorder, disability or other health impairment as a result of the nature, severity or probable duration of which, in the opinion of a medical officer concurred in by at least one other medical officer, ...
> (ii) their admission would cause or might reasonably be expected to cause excessive demands on health or social services; ...

Anvari argued that the Department discriminated against him on the basis of his disability, and he succeeded at both the Tribunal and the Review Tribunal. The Department, however, successfully sought judicial review in the Federal Court, where Anvari was unrepresented.

Both the Tribunal and the Review Tribunal found as a fact that there was direct discrimination against the Complainant on the basis of his disability. Both tribunals then proceeded to determine if the discrimination was justified under section 15(g) of the *CHRA* which reads as follows:

> 15. It is not a discriminatory practice if
> ...
> (g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, ... or is a victim of any adverse differentiation and there is bona fide justification for that denial or differentiation. [51]

The Tribunal found that under section 19(1)(a) of the *Immigration Act*, the *bona fide* justification was not found in the section itself, but in the various opinions of the medical officers which the section mandated. Using this approach, every case would be examined on its facts to determine if applicants had been properly included in the section.

Mussa v. Canada (Minister of Employment and Immigration) Ontario Court (General Division) Court File No. 93-00-45153 and anticipates challenging the amended section 19(1)(a) under the *Charter* when it is proclaimed.

51. *Supra* note 3.

> This discrimination decision was made, based upon s.19(1)(a) of the Immigration Act; presumably, that section of the Immigration Act outlines the basis for the bona fide justification for the adverse differentiation which it also creates.[52]

On Judicial Review in the Federal Court, Mr. Justice Mahoney overturned the Review Tribunal decision.[53] The Court found that the section itself created a *bona fide* justification for the discrimination. Further, that in cases of direct discrimination there was no requirement to enquire into the reasonableness of the complainant's inclusion in that category:

> With respect, it was wrong in law in finding that there was jurisdiction under the CHRA to decide that the discriminatory practice mandated by the provision is not bona fide justified unless it is demonstrated that it has been applied in a reasonable fashion or that its application is justified in the particular case. For jurisdiction to arise under the CHRA, the provision must have been applied in a discriminatory fashion. Unless a prima facie case of a discriminatory practice on the part of the medical officers in reaching their opinion were established, there was no onus on them to show that their opinion was bona fide justified.[54]

The Court hints that this question is more appropriately posed in a different forum, supposedly a judicial review of the decision that the complainant falls within 19(1)(a)(ii) of the *Immigration Act*:

> It may have been reached wrongly as a matter of law or it may have been reached in the teeth of the evidence and, if it was, a remedy exists elsewhere but, unless a discriminatory practice is established in the application of subsection 19(1)(a), no remedy exists under the CHRA.[55]

While Mr. Justice Mahoney's decision has other analytical problems, the rationale for his decision is not well articulated, nor is it obvious. What is most startling about the *Anvari* decision, however, is that while it acknowledges the "paramountcy" of the *CHRA*, it seems to find that the mere existence of section 19 constitutes a *bona fide* justification under section 15 of the *CHRA*. Mr. Justice Mahoney deals with the issue in the most cursory manner possible, finding justification without examining the evidence or the rationale that was before the Tribunal:

> While counsel for the Commission was disposed to cavil at the proposition, it seems clear to me that the Tribunal and Review Tribunal accepted that subpara. 19(1)(a)(ii) mandates an otherwise discriminatory practice which is bona fide justified. That was correct in law.[56]

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52. *Anvari supra* note 22.

53. *Anvari, supra* note 1.

54. *Ibid.* at 198.

55. *Ibid.*

56. *Ibid.*

This approach is not in accord with the law that has developed in cases where a practice mandated or permitted by statute is challenged under human rights law. If a statutory practice offends human rights legislation, there are two available arguments. Firstly, the legislative provision itself can be overridden by the human rights legislation, or secondly, the statutory practice must be performed in a way which does not conflict with human rights legislation.

It appears that the Tribunal took the second approach, although they did not clearly say so. By looking for the *bona fide* justification in the medical opinions filed in the case, the Tribunal, in effect, reviewed the Department's actions in light of the law on "*bona fide* justification" under section 15 of the *CHRA*.

It is suggested that in *Anvari* either approach would have been appropriate. The Federal Court could have quite properly overridden the section in its entirety, or sought to apply it in a manner which did not offend the *CHRA*. Unfortunately the Court did neither.

1. The Override Argument

The Supreme Court of Canada has repeatedly emphasized the special nature of human rights legislation, casting it as "quasi-constitutional"[57] and granting it clear paramountcy when in conflict with other legislation.

> When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of the legislature speaking to the contrary in express and unequivocal language in the *Code* or in some other enactment, it is intended that the Code supersede all other laws when conflict arises.
>
> As a result, the legal proposition *generalis specialibus non derogant* cannot be applied to such a code. Indeed the *Human Rights Code*, when in conflict with "particular or specific legislation" is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law.[58]

It is argued that section 19(1)(a) of the *Immigration Act* is clearly discriminatory, and that the Department's and the Court's reliance upon the statutory enactment itself, cannot provide a *bona fide* justification. The mere fact that the legislature has authorized a discriminatory practice does not isolate that practice from a Human Rights review, because of the paramountcy of human rights legislation.

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57. *Singh, supra* note 44, 224.

58. *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 at 158.

Nowhere in the *Immigration Act* are any other groups singled out for possible exclusion on these grounds. For instance, applicants with other risky lifestyles or who have made risky occupational choices which have been shown to increase the risks of injury or debilitating disease are not screened. Immigration does not screen for smokers, firefighters, hockey players, boxers or accident prone drivers, and require them to prove that they will not place excessive demands on health or social services in the future. Neither do they screen other applicants, for instance the intellectually gifted, who might well take advantage of special gifted programs, loans, bursaries or subsidized academic studies at universities during their lifetime. Arguably, all of these applicants could well place additional demands on Canadian services, either as a result of their unique abilities, or because they are engaged in some risky behaviour or occupation.

It is argued that Immigration discriminates against disabled people **simply by applying** section 19(1)(a), irrespective of the manner in which is it applied. By singling out people with disabilities, and then narrowly focusing on the health and social services aspect of government expenditures, without any assessment of an applicant's potential contribution to Canadian society, disabled applicants, as a class, have been discriminated against contrary to the *CHRA*.

2. *Bona fide* Justification and Applying the law in Accordance with the *CHRA*.

Not only did the Court in *Anvari* fail to consider any question of the legitimacy of section 19(1)(a) of the *Immigration Act* itself, but it also failed to properly apply the law once it had accepted that discrimination did exist. The Supreme Court has set out a procedure for analyzing discrimination, which essentially involves a two step process. The complainant has to establish a *prima facie* case of discrimination, the burden then shifts to the respondent to show that the discrimination is justified under section 40 (g). This procedure was outlined in detail in *Etobicoke:*

> Once a complainant has established before a board of inquiry a prima facie case of discrimination, in this case proof of a mandatory retirement at age sixty as a condition of employment, he is entitled to relief in the absence of justification by the employer. The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon him, that such compulsory retirement is a bona fide occupational qualification and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities.[59]

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59. *Ontario Human Rights Commission v. The Borough of Etobicoke*, [1982] 3 C.H.R.R. Decision 164, at D/783. (S.C.C.). [hereinafter *Etobicoke*].

The term "*bona fide*" is used frequently in human rights legislation and has been the subject of considerable judicial comment. The Federal Court of Appeal has said that "*bona fide* justification" conveys the same meaning as the words "*bona fide* occupational requirement" and "*bona fide* occupational qualification", both of which are used in other parts of the *CHRA*. The only difference is that "*bona fide* justification" is used in contexts other than employment.[60]

The Supreme Court of Canada has held that where the "*bona fide* occupational requirement" defence is raised, the interpretation of the exception must be restrictive so as not to frustrate the overall objects of the *Canadian Human Rights Act*.

> One of the reasons such legislation has been so described [as being of a special nature] is that it is often the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed.[61]

The Court in *Anvari*, once it found discrimination, should have embarked upon an examination of the *bona fides* of any justification presented by the Department. In the labour context, this has meant that an employer must not only show that the qualification is imposed in good faith, but that it is also reasonably necessary to the performance of the job.[62] To succeed, the Immigration Department would have to show good faith in enacting section 19(1)(a), and a clear connection between the discrimination practised and some immigration objective, arguably one which is included in section 3 of the *Immigration Act*.

The record in *Anvari* indicates that no evidence was introduced at the Tribunal upon which Mr. Justice Mahoney, in the Federal Court, could have based his finding that the blanket discrimination was justified. It appears that Mr. Justice Mahoney, accepted that Parliament had legislated the discrimination, and that this alone created a presumption of *bona fide* justification. One is led to the inescapable conclusion that the failure to challenge the section directly arises from the Court's own "impressions" of what constitutes a *bona fide* justification. Arguably, the Court may have believed that it is justifiable to discriminate against disabled persons because of an anticipated drain on Canadian social services. In the absence of any evidence, however, such a conclusion could only derive from the Court's own impressions.

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60. *Rosin, supra* note 24.

61. *Ontario Human Rights Commission v. Zurich Insurance Company*, [1992] 16 C.H.R.R. D/255 at 263.

62. *Saskatchewan (Human Rights Comm.) v. Saskatoon (City)*, [1990], 11 C.H.R.R. Decision/22.

In *Etobicoke*, Mr. Justice McIntyre specifically rejected the "impressionistic" evidence of witnesses that firefighting is a "young man's game", which was advanced to justify mandatory retirement at age sixty.

> In dealing with the question of a mandatory retirement age it would seem that evidence as to the duties to be performed and the relationship between the aging process and the safe, efficient performance of those duties would be imperative. ... Where a limitation upon continued employment must depend for its validity on proof of a danger to public safety by the continuation in employment of people over a certain age, it would appear to be necessary in order to discharge the burden of proof resting upon the employer to adduce evidence upon this subject. ... It seems to me, however, that in cases such as this statistical and medical evidence based upon observation and research on the question of aging, if not in all cases absolutely necessary, will certainly be more persuasive ... [63]

The Court in *Anvari* appears to have employed an analytical method which leaves disabled people in a most vulnerable position, as decisions are easily influenced by unchallenged myths and stereotypes about the lifestyles and social contributions of persons with disabilities.

In light of the fact that no evidence was tendered by the Department to justify the overall discriminatory practice, it is hard to see how the Department could have discharged the burden of proving "*bona fide* justification". The mere expectation that a disabled person might cause demands on health or social services can hardly be a justification for discrimination, particularly when no other applicants are screened in the same way, and when no balancing of an applicant's potential contribution to Canadian society is weighed against those medical or social costs.

If for some reason, the argument that section 19 of the *Immigration Act* should have been overridden in its entirety is not persuasive, then the Court should have examined whether section 19 had been applied in a manner consistent with the *CHRA*. In other words, was the application of the section justified in Mehran Anvari's case? In *Anvari*, the medical evidence was the only evidence tendered by the Department of any *bona fide* justification. The Tribunal and the Review Tribunal were correct in weighing this evidence, and their finding that it fell far short of the strong and compelling evidence required to provide a *bona fide* justification, should have been upheld on judicial review.

It is argued that had the law been properly applied by the Federal Court in *Anvari*, either by challenging section 19 directly, or by properly assessing *bona fide* justification according to the law in the application of section 19, the result would have been quite different.

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63. *Etobicoke, supra* note 59 at D/784.

C. Adverse Effects Discrimination

While the *Immigration Act* discriminates directly against people with disabilities, it does not, on its face, discriminate against people on the basis of race, religion or national origin. Any complaints in these areas would predictably be of "adverse effects" discrimination. The Supreme Court in *O'Malley* has outlined the difference:

> A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." ... On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.[64]

In *Menghani,*[65] an applicant for an immigrant visa was required to produce specific papers to prove a fraternal relationship. No other documentation was acceptable to the Department. The complainant successfully argued that this amounted to discrimination where it was shown that such papers were not available in his country of origin. On Judicial Review, the Department argued that the Applicant had been refused admission on the basis of insufficient documentation, and that to succeed he had to show that he had been treated differently as a result of particular characteristics attributed to him because of his national origin.

In rejecting such a restricted interpretation, the Court approved of the *O'Malley* case to find that discrimination:

> may be described as the imposition of obligations, penalties or restrictive conditions that result from a policy or practice which is on its face neutral but which has a disproportionately negative effect on an individual or group because of a special characteristic of that individual or group[66]

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64. *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at 551.

65. *Supra* note 39 at 53.

66. *Ibid.* at 55.

VI. REMEDIES AVAILABLE

Section 53(2) of the *CHRA* provides remedies which are within the power of the Commission to order if a Tribunal finds discriminatory practices:

> (2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates issubstantiated, it may, subject to subsection (4) and section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:
>
> (a) that the person cease the discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures, including
> (i) adoption of a special program, plan or arrangement referred to in subsection 16(1), or
> (ii) the making of an application for approval and the implementing of a plan pursuant to section 17, in consultation with the Commission on the general purposes of those measures.
> (b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;
> (c) that the person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice; and
> (d) that the person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice.[67]

The question of available remedies is obviously of paramount importance for immigration complainants, and could raise some of the most difficult problems. In *Menghani* the Federal Court accepted that the Canadian brother could qualify as a victim with status to bring a complaint under the *CHRA*. There was also a finding that the Department of Immigration had engaged in a discriminatory practice which had an adverse effect upon the complainant, by the insistence on specific high school papers unavailable in India, to prove the fraternal relationship. The Court, however, found that the remedy ordered, that of processing the complainant's brother for landing in Canada, was beyond its jurisdiction.[68]

Section 53(2) of the *CHRA* permits an order which "makes available to the victim of the discriminatory practice" certain opportunities or privileges. Mr. Justice MacKay reasoned that since the introductory words of section 53 speak

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67. *Supra* note 3.

68. *Menghani, supra* note 39 at 60.

of "the complaint", that any orders under section 53(2) can only relate to the complainant.

> While the tribunal found that his brother was discriminated against by the adverse effect discrimination of the practice followed in New York by the visa officer, no complaint in relation to that discriminatory practice could be dealt with by the Commission, or by the tribunal, by virtue of section 40(5)(c). Thus, in my view, there is a statutory bar to an order of the sort here issued. In my view there is also a general objection to an award of specific relief to one who is not a complainant under the Act.[69]

One might equally well argue that the use of the word "victim" in section 53(2), as opposed to "complainant" is indicative of an intention to allow the Commission broad latitude in making orders, particularly in situations where there might have been multiple victims. It is certainly puzzling that the Court would refuse to apply the same broad definition of "victim" in the remedies section of the *CHRA*, particularly in light of specific Supreme Court instructions to the effect that Human Rights legislation must be given a broad purposive interpretation.[70]

The difficulty for the Commission appears to be to find an order which will redress the harm done to the complainant, without ordering specific relief to one who is not a complainant, and who could not be. Arguably the problem is insoluble as it is hard to conceive of a remedy which would redress the harm done to Mr. Menghani, without also remedying the discrimination against his brother. Unfortunately, the Federal Court is of no assistance in resolving the dilemma that they have created, and merely refer the matter back for an

> "appropriate order which would make available to Jawahar Menghani the right or opportunity which was found to be denied to him as a result of the discriminatory practice."[71]

In the absence of some very creative thinking about an alternative Order at the Tribunal level, the implications of the *Menghani* decision will be profound. If it stands, the narrow interpretation of who can be a "victim" for the purposes of remedies would obviously render meaningless any complaints initiated on issues related to visa or immigrant applications, even if permitted to proceed.

VII. CONCLUSION

Very few immigration complaints have been brought before the Canadian Human Rights Commission for consideration. A number of factors probably

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69. *O'Malley, supra* note 64 at 546.

70. *Ibid.*

71. *Menghani, supra* note 39 at 63.

contribute to the low numbers, including a lack of familiarity with the *CHRA* among immigration lawyers, and more recently the restricted remedies which the Federal Court has now said are available for complainants. In addition, lengthy delays are experienced by all complainants in the processing of their claims, a factor which can have critical effects in the immigration context. Indeed, in *Menghani,*[72] Mr. Menghani had unfortunately declared bankruptcy and was no longer in a position to offer a job to his brother by the time the case was returned to the Tribunal for resolution.

Given the present state of the law, it would indeed be futile in most cases to even consider commencing an immigration case under the *Canadian Human Rights Act*. Despite the promise of section 2 and the parliamentary assurances about its purpose and intent, it may, by judicial interpretation have become completely incapable of redressing wrongs in the immigration context. This will remain so until section 40(a) of *CHRA* is challenged on constitutional grounds, until a direct challenge to section 19(1)(a) of the *Immigration Act* is mounted under the *CHRA*, and until *Menghani* is overruled and remedies become available.

Furthermore, it is clear that the Department itself is bound and determined to fight the Commission at every step of the way in any investigation. Their initial refusal to cooperate in investigations and the repeated challenges to jurisdiction at the inquiry level and on review, continue to frustrate any honest attempts to scrutinize departmental policies and practices. Observers are left with the clear impression that the real extent of discriminatory practices at the Department of Immigration has yet to be determined, but that, regardless of what those discriminatory practices might be, the judiciary appears to have granted the Department the ability to discriminate with impunity.

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72. *Ibid.*